IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.274 OF 2006

The Commissioner of Central)
Excise, Mumbai -III, Mumbai)
3rd & 4th Floor Vardhan)
Trade Centre, Road No.16,)
Wagle Inds. Estate, Thane,)..Appellant.

V/s.

M/s.Harinagar Sugar Mills Ltd.)
L.B.S. Marg, Bhandup (W),)
Mumbai - 400 078.)..Respondent.

Mr.K.R.Chaudhari with Rajendra Kumar i/b. H.P. Chaturvedi for appellant.

Ms.Aparna Hirandagi with M.H. Patil for respondent.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 28TH SEPTEMBER, 2007.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. Heard.

2. The appeal is admitted on the following questions of law:-

1) Whether the CESTAT is justified in holding that the extended period of limitation is not applicable in the present case without even discussing the elements of expenses incurred by the assessee which were suppressed with intent

to evade central excise duty ?

2) Whether the department is entitled to invoke extended period of limitation when the wilful suppression of certain expenses incurred by the assessee while declaring the assessable value with intent to evade central excise duty ?

3) Whether CESTAT has erred in setting aside the demand as time barred, by not justifying the amendment made in section 11A vide section 110 of Finance Act, 2000 ?

3. By consent of both the parties, the appeal is taken up for final hearing.

4. The relevant facts are that since 1989 the respondent (hereinafter referred to as 'the assessee') is engaged in the manufacture of biscuits which are liable to central excise duty under the Central Excise Tariff Act, 1985.

5. The assessee manufactured biscuits for an on behalf of M/s.Britannia Industries Ltd. ('BIL' for short) as per the agreement entered into by and between the assessee and the BIL. Under the said agreement, machineries / equipments required for manufacture of biscuits were to be provided by BIL to the assessee.

6. During the year from 1989 till 1996 the biscuits manufactured by the assessee were valued by taking job work charges as per the decision of the Apex

Court in the case of Ujjagar Prints reported in 39 E.L.T. 493.

7. Thereafter, by a show cause notice dated 27th May, 1996 assessee was called upon to show cause as to why depreciation allowed on the machinery and equipments supplied by BIL for the special job should not be included in the assessable value of the biscuits manufactured by the assessee. The said show cause notice was decided on 1/11/1996.

8. Thereafter,a second show cause notice was issued on 4/4/1997 alleging that the assessee had suppressed the value of the machinery for determining the assessable value during the period 1991-92 to 1995-96 and accordingly by invoking larger period of limitation, the assessable value of the biscuits cleared during those period were sought to be enhanced with a view to recover the central excise duty thereon. The said show cause notice was adjudicated and by an order in original dated 29/11/1997 the demand was confirmed and penalty was levied upon the assessed under section 11AC and interest was also levied under section 11AB of the Central Excise Act, 1944.

9. Challenging the aforesaid order, the assessee filed an appeal before the Commissioner of Central

Excise (Appeals). By an order dated 28/7/2000 the Commissioner of Central Excise (Appeals) held that in the facts and circumstances of the present case, the extended period of limitation was not applicable and, therefore, the show cause notice was invalid. However, in view of section 110 of the Finance Act, 2000, the Commissioner of Central Excise (Appeals) held that the impugned show cause notice got validated. Challenging the said order, the assessee filed an appeal before the CESTAT and by the impugned order, the CESTAT set aside the order passed by the Commissioner of Central Excise (Appeals) inter alia on the ground that the Validation Act does not confer unfettered powers to the revenue to raise the demand beyond the period of limitation even when there was no misstatement or suppression. Challenging the said order, the present appeal is filed by the revenue.

10. It is pertinent to note that the finding recorded by the Commissioner of Central Excise (Appeals) to the effect that there is neither misstatement nor suppression of facts and, therefore, the extended period of limitation could not have been invoked in the present case has not been challenged by the revenue. Therefore, the only question before the Tribunal was whether, section 110 of the Finance Act, 2000 validates a show cause notice invoking larger period of

limitation is found to be invalid on the ground that there was neither misstatement nor suppression of facts?

11. Section 110 of the Finance Act, 2000 reads as under:-

> "110. Validation of action taken under section 11A of Act 1 of 1994 -
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> (1) Any notice issued or served on any person under the provisions of section 11A of the Central Excise Act during the period commencing on and from the 17th day of November, 1980 and ending on the date on which the Finance Act, 2000 receives the assent of the President (hereinafter referred to as the said period) demanding duty on account of non-payment, short payment, non-levy, short-levy or erroneous refund within a period of six months or five years, as the case may be, from the relevant date as defined in clause (ii) of sub-section (3) of that section shall be deemed to be and to always have been, for all purposes, validly and effectively issued or served under that section, notwithstanding any approval, acceptance or assessment relating to the rate of duty on or value of, the excisable goods by any Central Excise Officer under any other provision of the Central Excise Act or the rules made thereunder.
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> (2) Any action taken or anything done or purporting to have been taken or done under section 11A of the Central Excise Act at any time during the said period shall be deemed to be and to have always been, for all purposes, as validly and effectively taken or done as if sub-section (1) had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree of any court, tribunal or other authority-
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> (a) all duties of excise levied, assessed or collected during the period specified in sub - section (1) on any excisable goods under the Central Excise Act, shall be deemed to be and shall be deemed to always have been, as validly levied, assessed or collected as if sub-section (1) had been in force at all

material times;

(b) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for the refund of, and no enforcement shall be made by any court of any decree or order directing the refund of any such duties of excise which have been collected and which would have been validly collected if sub-section (1) had been in force at all material times;

(c) recovery shall be made of all such duties of excise which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, would not have been refunded, if sub-section (1) had been in force at all material times.

Explanation - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force. "

11. On perusal of Section 11 of the Finance Act it is seen that the said section validates only those show cause notices issued during the period specified therein which were found to be invalid on account of approval, acceptance or assessment relating to the rate of duty or on the value thereof. In other words, section 110 of the Finance Act, 2000 would not apply to those show cause notices where it is held that invoking larger period of limitation is unjustified on the ground that there is no fraud, collusion, misstatement or suppression of facts for invoking the larger period of limitation.

13. As stated hereinabove, in the present case the revenue has accepted the finding given by the Commissioner of Central Excise (Appeals) to the effect that there was no fraud, collusion, misstatement or suppression of facts by the assessee. In this view of the matter, the finding recorded by the Tribunal to the effect that section 110 of the Finance Act, 2000 has no application to the facts of the present case cannot be faulted. Thus, the first two questions raised by the revenue do not arise from the order of the Tribunal. For the reasons stated hereinabove, the third question is answered in favour of the assessee and against the revenue.

14. Accordingly, the appeal is dismissed with no order as to costs.

(F.I.REBELLO, J.)

(J.P.DEVADHAR, J.)